

January 6, 2017

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Office of the Comptroller of the Currency
Legislative and Regulatory Activities Division
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Docket ID OCC-2016-0005
RIN 1557-AD67

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Board of Governors of the Federal Reserve
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Docket No. R-1549
RIN 7100 AE 60

Robert E. Feldman, Executive Secretary
Attn: Comments/Legal ESS
Federal Deposit Insurance Corporation
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FDIC – Loans in Areas Having Special Flood
Hazards – Private Flood Insurance
RIN 3064-AE50

Barry F. Mardock, Deputy Director
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RIN 3052-AD11

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1775 Duke Street
Alexandria, VA 22314-3428
RIN 3133-AE64

Re: Joint Notice of Proposed Rulemaking on Loans in Areas Having Special Flood Hazards

Dear Sirs and Madams:

Bank of America (the “Bank”) appreciates the opportunity to comment on the proposals of the Office of the Comptroller of the Currency (“OCC”), the Board of Governors of the Federal Reserve System (“Board”), the Federal Deposit Insurance Corporation (“FDIC”), the Farm Credit Administration (“FCA”), and the National Credit Union Administration (“NCUA”) (together, the “Agencies”) to implement the private flood insurance provisions of the Biggert-Waters Flood Insurance Reform Act of 2012 (“Biggert-Waters” or the “Act”).

The Bank continues to support the Act’s core goal of improving utilization of private flood insurance in areas having special flood hazards and the Agencies’ efforts to achieve this goal. We also commend the Agencies for reissuing the Notice of Proposed Rulemaking (“NPRM”) after careful consideration of input from concerned parties, including the Bank. In comments on the previous NPRM, the Bank suggested that the Agencies should establish specific criteria for determining whether a private insurance policy is “at least as broad as” coverage provided by a standard flood insurance policy (“SFIP”), incorporate an additional safe

harbor, and allow lending institutions to accept flood insurance policies that do not meet the definition of “private flood insurance.” The Bank gratefully acknowledges that the Agencies have sought to address these suggestions. However, we remain concerned that the proposed rules will not successfully foster the market for private flood insurance as contemplated by Biggert-Waters and will instead create delays and complications for borrowers. We therefore respectfully submit the following comments on the proposal.

I. The Mandatory Acceptance and Compliance Aid Provisions Should Allow Lenders To Rely In Good Faith On An Insurer’s Written Assurance That A Policy Complies With Legal Requirements

The Agencies’ proposal would amend the regulatory definition of “private flood insurance” to reflect the requirements of new § 102(b)(7) of the Flood Disaster Protection Act and would add a “compliance aid” to assist lenders in evaluating whether a policy meets regulatory requirements. The Bank appreciates the Agencies’ efforts to reduce the burdens of evaluating private flood insurance policies and thereby to foster the market for private insurance. However, in our view, the proposal continues to rely too heavily on lenders’ conducting extensive evaluations of private flood policies—which the Agencies recognize “are often lengthy and complicated”¹—and thus is unlikely to successfully promote a market for private policies.

As the proposal recognizes, lending institutions are not well-positioned to make a determination that a private flood policy is “at least as broad” as coverage under an SFIP. They generally do not have the expertise or capacity to evaluate complicated private insurance policies to determine the overall breadth of coverage available, a task made more difficult by the lack of standardization in private policy forms, terminology, definitions, and organization. Evaluating flood policy coverage presumably would require lenders to hire and retain employees (or vendors) with sufficient insurance expertise to examine all relevant policy documents (*i.e.*, not only a declarations page) to determine the scope of coverage. This will likely lead to delays and complications in accepting private flood insurance: lenders would have to identify all the relevant policy documents, understand the coverage terms, confirm items with borrowers and the insurers, and make a determination of coverage scope relative to an SFIP. The delays and complications of this process could discourage use of private policies, as borrowers may choose to obtain an SFIP policy as the only way to ensure the timely closing of their loan, thus hampering the market for private flood insurance, contrary to the purpose of Biggert-Waters.

The proposed compliance aid is a step in the right direction, but it does not entirely solve the problem. The compliance aid does not foreclose the possibility that a regulatory action could be taken where a lending institution uses the compliance aid in good faith but mistakenly fails to accept a policy that meets the definition of “private flood insurance” or accepts a policy which does not meet the definition. Moreover, the compliance aid still requires the lender to review the written summary provided by the insurer and verify in writing that the private policy includes the provisions identified by the insurer and that such provisions “satisfy” the criteria included in the definition of “private flood insurance,” with all the delays and complications of this process. In addition, the compliance aid can only be used if insurers in fact provide a written summary of the provisions that meet the definition of “private flood insurance” and a specific provision or

¹ 81 Fed. Reg. 78,063, 78,068.

endorsement that the policy meets the definition of “private flood insurance.” Because of the mandatory acceptance requirement, there is little incentive for insurers to do so because lenders would be required to review and accept the policy if it meets the definition, regardless of whether the summary and assurance are provided. Therefore, there is significant doubt whether the proposed compliance aid would become market standard based on these requirements and the lack of protections for lenders who may elect to use the aid.

A better approach—and one more likely to foster the market for private flood insurance and avoid delays and complications for consumers—would be to allow lenders to rely on the written assurance of the insurers who have an economic interest in selling the policy. The final rule could implement this approach in two ways. First, the Bank recommends adopting an interpretation of “at least as broad as” that would require mandatory acceptance only of policies that included such assurances. Alternatively, the Bank suggests streamlining the compliance aid to allow lenders to rely on an insurer’s written assurance that the policy complies with the definition of “private flood insurance” without any further requirements.

- a. Permitting lenders to refuse policies that lack an insurer assurance of compliance would help promote a sustainable market for private flood insurance.

The Agencies could provide that lenders may refuse to accept private policies that do not include an assurance of compliance by the insurer. One way to implement this would be to include an assurance of compliance as a component of the definition of “private flood insurance.” The Agencies’ could provide that a “private insurance policy” is “at least as broad as” an SFIP only where the policy includes an assurance by the insurer to that effect. We understand that the Agencies appear to have concluded, without detailed explanation, that the statute does not permit such a “safe harbor.”² But the straightforward change we propose is reasonable in light of the text and purposes of Biggert-Waters and we believe within the Agencies’ authority to prescribe. Such a provision would also be easily administrable and would reduce the ambiguity and complexity of the regulation.

Including an assurance of compliance as part of the regulatory definition would, above all, advance the purposes of Biggert-Waters by fostering a market for private flood insurance. This approach would make insurers responsible in the first instance for determining whether private policies provide sufficient coverage and would allow lending institutions to rely on those determinations. It would also properly place incentives to assure compliance on the entity with the principal economic interest in promoting private insurance—that is, on the insurers themselves. Insurers would thus have strong reasons to add an assurance to their private policies, as it would be the only way to guarantee acceptance of the policy by the lender.

² *Id.* (stating that under the Act lending institutions must accept private flood insurance policies “even if the policy is not accompanied by a written summary and does not include an assurance clause”).

Moreover, insurers who erroneously certify compliance would be exposed to contractual liability and could be liable for flood losses to the extent of an SFIP policy.³

A rule allowing lenders to require an assurance of compliance would greatly improve the market for private flood insurance. Any process that relies on lending institutions to determine whether insurance policies comply with SFIP requirements creates substantial uncertainty for insurance providers, who cannot write policies that they know will be accepted by lenders, and causes delays and complications for consumers. A rule allowing lenders to reject policies without a written assurance would give insurers the necessary incentive to provide an assurance and would allow insurers to write and market flood policies with reasonable certainty that their policies will be accepted. Consumers would likewise benefit in knowing that their chosen insurance policy will be promptly accepted by lenders. We therefore strongly urge the adoption of this approach.

- b. Alternatively, the compliance aid should be streamlined to allow lenders to rely on an insurer's written assurance only.

In the event that the Agencies do not adopt the proposal above, the Bank proposes streamlining the compliance aid. Under the current proposal, the compliance aid would require insurers to provide a written summary that “demonstrates how the policy meets the definition of private flood insurance,” and would require lenders to “verif[y] in writing that the policy includes the provisions identified by the insurer... and that these provisions satisfy the criteria included in the definition.”⁴ Although this verification exercise may present a lesser burden than the full “at least as broad as” assessment, it nevertheless poses similar challenges and potential for delay. The Bank proposes instead that the compliance aid should be streamlined to allow lenders to rely—full stop—on an insurer’s written assurance that the policy meets the definition of private flood insurance. We also suggest that the form of written assurance should be expanded to include any form of assurance that is legally enforceable against the insurer, rather than only allowing the assurance as a provision of, or endorsement to, the private policy.

This streamlined compliance aid would avoid the inevitable delays and complications in evaluating private flood insurance policies and provide greater certainty for lenders, borrowers and insurers. Lenders would be able to rely on insurers’ assessments of the scope of policy coverage, and insurers would be spared uncertainty associated with lenders’ review. Moreover, a streamlined compliance aid would better promote the use of private flood insurance in the marketplace. For example, this rule would reduce the risk that a private policy issued by one insurer would be subject to differing determinations by lenders, being rejected by some lenders and accepted by others. In addition, the greater flexibility in how private insurers can provide

³ An alternative, though less desirable approach, would be to allow insurers and lenders to jointly rely on certifications from a third-party organization, along the lines of the state regulatory agency safe harbor in the previous version of the proposed rules. The definition of “private flood insurance” could incorporate a certification from a self-regulatory organization that the policy’s coverage is at least as broad as that offered by an SFIP; such certifications could be based on certain template policies approved by the third-party organization. Although these solutions might necessitate the creation of new mechanisms for evaluating and certifying private insurance policies, these mechanisms would be more streamlined than requiring each lending institution to make its own determinations on a policy-by-policy basis.

⁴ *Id.* at 78,074.

assurance of compliance to lenders would also allow more private policies to be accepted. Removing this uncertainty and creating more ways for private insurers to provide assurances regarding compliance would help foster the market for private flood insurance, as contemplated by Biggert-Waters.

II. Discretionary Acceptance: Lenders Should Be Allowed To Accept Private Policies For Residential and Non-Residential Properties That Provide Sufficient Protection Of The Loan, Consistent With Safety And Soundness Principles.

The Bank continues to support allowing lending institutions discretion to accept private flood insurance policies that do not meet the definition of “private flood insurance.” We also support the proposed discretionary acceptance provisions that would require a private policy at a minimum (i) to be issued by an appropriately licensed or approved insurer, (ii) to cover both mortgagor and mortgagee (subject to two proposed clarifications below), and (iii) to be subject to cancellation only in specified circumstances (subject to a proposed clarification below).⁵ However, consistent with our proposal above, the Bank believes that lenders are not well-situated to analyze whether a private flood insurance policy provides coverage that “is similar to coverage provided under an SFIP.”⁶ Instead, we propose permitting lenders to accept a private flood insurance policy under the discretionary acceptance provision, whether for residential or non-residential properties, if the lender determines the policy provides sufficient protection of the loan consistent with general safety and soundness principles.

- a. Allowing discretionary acceptance consistent with safety and soundness principles would provide lenders with requisite flexibility and would support the goals of Biggert-Waters

Allowing discretionary acceptance based on safety and soundness principles for all property types would reduce the ambiguity and complexity of the discretionary acceptance provision and would better promote the use of private flood insurance in the marketplace. All regulated lenders should already have established processes to assess the safety and soundness of insurance policies, which will simplify the process for lenders. Insurers would also be less subject to differing determinations by lenders as to whether their policies are “similar” to an SFIP, which will encourage participation in the marketplace.

This approach would also be consistent with other elements of the Agencies’ proposal. First, the proposed rule provides that lenders may accept private flood insurance policies issued by a mutual aid society if, among other things, the lender “verif[ies] that the policy is consistent with general safety and soundness principles, such as whether deductibles are reasonable based on the borrower’s financial condition” without any distinction between whether the policy is for a residential or non-residential property.⁷ Second, the Agencies have invited comment as to whether lenders should be permitted to accept private flood insurance policies for nonresidential properties based in part on a determination by the lender “that the policy provides sufficient

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

protection of the loan secured by property, consistent with general safety and soundness principles.” The Bank supports both elements of the proposal, and believes these safety and soundness criteria also should apply to the discretionary acceptance of residential private flood insurance policies.

- b. At a minimum, the discretionary acceptance proposal should allow a safety and soundness standard for non-residential properties and should provide additional guidance for the “similar to” criteria for residential properties

If the Agencies do not allow lenders to rely on safety and soundness principles for all properties, the discretionary acceptance proposal should provide, at a minimum, a safety and soundness standard for accepting private policies covering non-residential properties and additional guidance regarding the “similar to” criteria for discretionary acceptance of private policies for residential properties.

The private insurance market for non-residential properties is unique. For example, many private insurance policies for non-residential properties that secure commercial loans are blanket policies with millions of dollars of coverage for all perils, including flood, and multiple properties, buildings, and contents. These policies are often complex and may involve multiple insurers. It will be a difficult exercise, at best, for lenders to apply the “similar to” SFIP standard to these types of policies. Lenders may feel compelled to reject private policies as not sufficiently similar to an SFIP policy even though the policies provide greater coverage amounts than an SFIP policy and are otherwise acceptable from a safety and soundness perspective. Allowing lenders to use a safety and soundness standard under the discretionary acceptance proposal for private policies covering at least non-residential properties would help to achieve the Biggert-Waters goal of promoting private flood insurance.

With respect to private policies for residential property, the rule should set out specific coverage requirements and identify the types of provisions that are necessary (or that render the policy unacceptable), rather than instructing lending institutions to determine, as a general matter, whether coverage “is similar to coverage provided under the SFIP” or to analyze “the differences between the private policy and the SFIP.” Providing more specific guidance would significantly reduce uncertainty for lenders and allow institutions to more readily analyze private insurance policy coverage for residential properties under the discretionary acceptance proposal.

III. Further Clarification When All Policy Documents Are Not Available

The Agencies’ proposal appears to assume that lenders will have timely access to all policy documents necessary to evaluate whether a private flood insurance policy meets the requirements of the rule. In practice, lenders are likely to have difficulty obtaining policy documents in many circumstances. In many cases, full policy documentation may not be available until after the loan closes. This is especially true when the policy premium is paid out of loan proceeds or where the effective date of the policy is around the time of closing. Moreover, when servicing a loan, insurers or borrowers often provide to lenders only a declarations page or an electronic data feed of the insurance policy information when the policy is renewed and thus lenders do not have the full policy documentation at the time of renewal. In other circumstances, where a borrower’s condominium is protected under a homeowners’

association private policy which includes flood coverage, it may be difficult or even impossible to obtain the full policy documentation from the homeowners' association.

The Agencies should therefore clarify what is expected of lenders in circumstances where full policy documentation may be unavailable or delayed. For example, would it be appropriate for a lender to rely on an application with proof of payment or a declarations page in such circumstances? And, where a lender cannot obtain all insurance policy documents for whatever reason, should a lender refuse to accept the private flood insurance coverage without exception and force-place insurance, even if it results in duplicate coverage and cost to the consumer? These are just a few of the questions that may be raised by incomplete or unavailable policy documentation; the Agencies should thoroughly consider the problem and propose comprehensive solutions.

IV. Requirement that Lenders Be Named as "Loss Payee"

The proposed definition of "private flood insurance" and the proposed rule for discretionary acceptance require an acceptable policy to cover "the mortgagor(s) and the mortgagee(s) as loss payees." The Bank respectfully recommends two clarifications.

First, rather than requiring designation as a "loss payee," this provision should require the lender to be named in the policy and to have rights similar to those of a named party under the NFIP. Some policies may protect the lender without referring to that institution as a "loss payee." For example, a policy may include the mortgagor as the insured or as an "additional named insured." The rule should be clear that the terminology used in the policy to refer to the lender is not relevant, provided that the policy offers the lender similar protection as an SFIP.

Second, there should be an exception to this criterion for limited situations in which lending institutions are not named in the policy for legal or practical reasons. For example, where a master flood insurance policy is obtained by a condominium homeowner's association for the benefit of the condominium association and its unit owners, the lending institutions who provided loans to the unit owners for purchase of their individual unit are typically not added as beneficiaries of the master policy. In these limited situations, lending institutions should still be able to accept the private flood insurance coverage under the discretionary acceptance standard.

V. Requirements Regarding Cancellation for Discretionary Acceptance

The proposed criteria for discretionary acceptance only allow discretionary acceptance if the policy "[p]rovides for cancellation following reasonable notice to the borrower only for reasons permitted by FEMA for an SFIP on the Flood Insurance Cancellation Request/Nullification Form, in any case of non-payment, or when cancellation is mandated pursuant to State law."⁸ It is unclear to the Bank what is meant by the phrase "mandated pursuant to State law." For example, state insurance law may allow insurance carriers to provide for certain cancellation or termination rights in their insurance agreements, but an insurer is not necessarily "mandated" to so include those cancellation provisions. The Bank respectfully

⁸ *Id.* at 78,074.

recommends revising this phrase so as to clarify and allow discretionary acceptance when a policy provides for cancellation as permitted or required by State law.

VI. Clarification Regarding Acceptability of Deductibles

The proposed definition of “private flood insurance” requires a policy to “[c]ontain[] deductibles no higher than the specified maximum for the same type of property, and include[] similar non-applicability provisions, as under an SFIP, for any total policy coverage amount up to the maximum available under the NFIP at the time the policy is provided to the lender.” The Bank respectfully recommends that the Agencies clarify whether policies that provide coverage in excess of the maximum available under the NFIP may contain deductibles that exceed the specified maximum for the same type of property under an SFIP. The Bank suggests that the final rule should clarify and allow lenders to accept private flood insurance policies with deductibles that are consistent with principles of safety and soundness in relation to the amount of coverage afforded by the policy where the coverage amount of the private policy exceeds the specified maximum under an SFIP. In other words, the Bank recommends that the rule should state that a lender may accept a private flood insurance policy with a deductible that is greater than the maximum deductible allowed under an SFIP policy when the coverage amount of the private policy exceeds the maximum coverage available under an SFIP policy and where the amount of the deductible is otherwise consistent with safety and soundness principles.

We appreciate the opportunity to comment upon the Agencies’ proposed rule, and we are grateful for the Agencies’ consideration of our views. We would be happy to address these issues further if you have questions about our submission.

Respectfully submitted,



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Bank of America